FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary association whose membership is open to the members of the bar of the States, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 200,000 members. One of the most important purposes of the ABA is the development and recommendation of professional standards, and in this regard, the ABA has promulgated a model Code of Profes-

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*This Brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

sional Responsibility as a recommendation to courts and governmental agencies. The interest of the ABA in this case is predicated upon its commitment to the position that the States must be given ample latitude to develop regulations that are effective to control the problems presented by client solicitation. DR2-103(A) and DR2-104(A) of the Ohio Code of Professional Responsibility, under which appellant was disciplined, are modeled on similarly numbered provisions of the Code recommended by the ABA at the time those provisions of the Ohio Code were adopted, and although the ABA Code has been subsequently amended, those amendments would not have affected the result here.[1]

SUMMARY OF ARGUMENT

While "advertising" and "solicitation" are not precise terms, public advertising of the kind upheld in *Bates* v. *State Bar of Arizona*, 433 U.S. ___, 97 S.Ct. 2691 (1977) differs in fundamental ways from the type of conduct ordinarily regarded as solicitation. The former utilizes public channels of communication and is not addressed to particular individuals, while the latter generally implies a direct, personal contact in order to persuade a potential client to hire a particular attorney for a specific purpose. Solicitation, by its nature, could not be as effectively regulated or monitored as public advertising, and, to the extent that its emphasis would be to persuade and to expedite decision-making, solicitation might well serve to discourage consumers from engaging in a critical comparison of objective information.

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[1] In August, 1977, the ABA House of Delegates amended DR2-103(A) and DR2-104(A) of the ABA Code so that the prohibition against solicitation would not apply to forms of public advertising that would be allowed under the amended provisions of DR2-101.

Since "solicitation" does not have a precise meaning, the term is generally avoided in State ethical rules, and the States instead proscribe particular forms of conduct posing the greatest dangers of abuse. To the extent that limitations are placed on unsolicited contacts with potential clients, however, those limitations serve important State interests. Solicitation would pose the danger that subtle forms of coercion and undue influence could be brought to bear to encourage unsophisticated persons to hire particular attorneys, but, unlike public advertising, solicitation would not be susceptible to regulation that would channel it into the most meaningful forms. The States may legitimately be concerned with these and certain other problems associated with direct solicitation, including the intrusion that unsolicited contacts would represent into the privacy of potential clients and the effect of this practice on the attorney's exercise of independent judgment.

Since the Ohio rules are not broader than necessary to protect legitimate State interests and since there is no dispute that appellant violated such rules, the decision below should be affirmed without regard to the allegedly "harmless" nature of appellant's particular conduct. In any event, appellant should not be permitted to challenge rules for which he was disciplined as being overbroad since his own conduct gives rise to legitimate State concerns.

ARGUMENT

I. Advertising Of The Type Considered In *Bates* Differs In Fundamental Ways From Conduct Ordinarily Regarded As "Solicitation."

In *Bates*, the Court emphasized that the constitutional issue was "only whether the State may prevent the publica-

tion in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services." 97 S.Ct. at 2709. Recognizing, however, that certain forms of "solicitation" might present different constitutional considerations, the Court specifically declined to rule on that issue. 97 S.Ct. at 2700, 2709.

Advertising of the type upheld in *Bates* utilizes public channels of communication, is visible to State regulatory authorities, and makes no representation and offers no inducement to specific individuals regarding claims that they might assert. While labels are not precise, "solicitation" generally refers to an entirely different type of conduct, ordinarily implying a direct, personal contact by a lawyer or his agent with an individual whom the lawyer hopes to persuade to hire him for a specific purpose. Solicitation, being private, is less susceptible to meaningful regulation by State authorities than public advertising and thus has a greater potential for abuse.

These differences between advertising and solicitation are significant to the First Amendment issues presented by this case. First, to the extent that commercial solicitation could be regarded as "conduct" rather than "speech," it may warrant somewhat less First Amendment protection than newspaper advertising of the kind involved in *Bates*. Even in the context of political or ideological expression, the Court has held that:

> "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

Since solicitation involves personally approaching prospective clients, employing agents to contact prospective clients, or entering into contracts of retainer, it comprises "nonspeech" elements that are not a part of public advertising. Numerous other examples can be cited of communications that are generally regarded as conduct for purposes of governmental regulation, including offers to sell securities, price information exchanges between competitors, and employers' threats of retaliation for employees' labor actions. *See, Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61–62 (1973); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 497–503, (1949). As Mr. Justice Black explained in *Giboney*, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. at 502.

In addition to possessing "nonspeech" elements that are missing from public advertising, solicitation also less directly serves—indeed may subvert—the societal interests identified in *Bates* as warranting the extension of First Amendment protection to certain types of professional advertising. As the Court recognized in *Bates*, certain commercial advertising is deserving of some constitutional protection because it may serve important "societal interests in assuring informed and rational decision-making." 97 S.Ct. at 2699. However, the emphasis of solicitation is to persuade, to cajole, and to expedite decision-making. It is likely to discourage consumers from engaging in a critical *comparison* of the "availability, nature, and prices" of services, which the Court recognized in *Bates* "performs an indispensable role in the allocation of resources in a free enterprise system." 97 S.Ct. at 2699. Moreover, given the availability of regulated

advertising as a means of fulfilling the public's interest in "informed and rational decision-making" regarding legal services, it is unlikely that solicitation would significantly increase the flow of information to potential consumers.

II. Although No State Prohibits All Forms Of Direct Solicitation Of Clients, Limitations On This Practice Are Justified By Important And Legitimate State Interests.

The term "solicitation" is avoided in the ethical rules adopted in most States, including the provisions of the Ohio Code of Professional Responsibility under which appellant was disciplined. Instead, the States seek to proscribe particular forms of conduct which pose the greatest dangers of abuse.

No State bans *all* unsolicited contacts with potential consumers of legal services. While the provisions are not directly involved here, the Ohio Code contains important exceptions to the general prohibition against unsolicited contacts, so as not to interfere with the functioning of legal services organizations satisfying the conditions of DR2-103(D) and so as not to interfere with First Amendment rights of association. *See, N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar*, 389 U.S. 217 (1967); and *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971).

In assessing the constitutionality of the particular restrictions on solicitation challenged by appellant, it is especially important that the public's interest in the legitimate objectives of the State regulatory scheme be fully considered. Appellant stresses his own "entitlement to the protection of the First Amendment in his daily chores" (Brief for

Appellant, at 37), while in *Bates*, the Court emphasized the public's interest in receiving product and service information rather than the advertiser's interest in disseminating his economic message. Lawyers are granted licenses to practice by the States and hold positions of special trust and obligation, and numerous restrictions circumscribe their conduct in the public interest. As the Court recognized in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975), "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" State limitations on direct solicitation of clients, while obviously preventing certain individual practitioners from being able to approach potential clients for private financial gain, serve important and legitimate State interests.

A. By Their Very Nature, Most Types Of Personal Contacts Initiated By Lawyers Or Their Agents With Potential Clients Would Not Be Susceptible To Effective State Regulation To Prevent Individuals From Being Misled or Coerced.

Wholly apart from the obvious abuses which have long been recognized to be inherent in door-to-door sales of ordinary consumer products,[2] the direct solicitation of clients by

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[2]The Federal Trade Commission has recognized the many types of abuses and problems that are inherent in direct home solicitation or door-to-door sales. Many of the most common abuses are documented in the report issued by the FTC after conducting hearings on this subject in 1972, including deception by salesmen in getting inside the door, high pressure tactics, misrepresentation as to the quality, price, or characteristics of the product, high prices for low quality merchandise, and the nuisance created

(footnote continued on next page)

lawyers or their agents would also create the potential for more subtle and more intractable forms of deception and undue influence.

In contrast to the consumer of more familiar products and services, the consumer of legal services is likely to know little about the nature of services that would be appropriate to his needs or to be able to compare the quality of services that are offered by different practitioners. The Court recognized in *Bates* that the public's lack of sophistication concerning legal services poses special problems of deception. 97 S.Ct. at 2709.

Confusion or lack of knowledge about legal services not only would make consumers susceptible to being misled by soliciting attorneys or their agents but also would make them more vulnerable to overreaching and undue influence. The danger would not be limited to use of overt forms of

by the visit to the home by the uninvited salesmen. Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22934, 22937 (1972).

Since home solicitation of customers frequently precludes any comparative shopping and results in uninformed purchases, the FTC concluded that excessive prices are "commonplace". *Id.* at 22939. As the National Consumer Law Center explained in its Statement, quoted in the FTC's report, "The door to door selling technique strips from the consumer one of the fundamentals in his role as an informed purchaser, the decision as to when, where, and how he will present himself to the marketplace." *Id.* at 22939, n.44. If such problems are presented by these attempts to sell simple consumer products, the problems would be greatly magnified in the context of solicitation by lawyers offering complex services about which the consumer is likely to have little information. Moreover, solicitation by lawyers poses unique dangers because the persons most likely to be the targets of solicitation, such as accident victims, members of a decedent's family, and persons charged with crimes, are particularly vulnerable to high pressure tactics and deception.

coercion by unscrupulous practitioners, such as refusing to terminate an unsolicited call on a prospective client or repeatedly contacting a prospective client who after previous communications expressed no interest. Nor would the danger be limited to situations where the person solicited was distraught or otherwise unable to think clearly, such as at the hospital room, the accident site, or the funeral parlor.

Disparity in knowledge about the services being sold would more generally give rise to the potential for undue influence whenever a lawyer sought directly to persuade a consumer to purchase his services. Because an individual would rarely have a basis for doubting a lawyer's representations as to his rights and liabilities, potential consumers of legal services may well be less able to resist the entreaties made through unsolicited contacts by lawyers than the entreaties of salesmen who seek them out to sell them more familiar products and services.

Moreover, the purchase of legal services, by the very nature of such services, could be encouraged through appeals to emotions that would not, in combination, animate the purchase of other types of services including fear, greed, and the desire for revenge. For example, without any overreaching or direct coercion, a lawyer could prey upon the individual's fear of going to prison in a criminal case or his fear of losing his home and other possessions in a civil proceeding to induce the lawyer's retention by a potential defendant.

Inducements used in direct solicitation would likely result in numerous instances in which consumers would retain the first lawyers who approached them, as did the two young women solicited by appellant.[3] Few clients would thereafter

[3] *Amici Curiae* Public Citizen and the National Resource Center for Consumers of Legal Services speculate at p. 27 of their Brief

(footnote continued on next page)

be willing to risk discharging the lawyers who had been hired, even if they were dissatisfied or changed their minds about taking the actions recommended, for fear of becoming involved in a legal dispute with a lawyer. Appellant's lawsuits for fees against the clients solicited provides a pointed illustration of the reasons why persons would generally be fearful of discharging lawyers whom they had retained. To the extent that removal of restrictions on solicitation would result in consumers' simply retaining the first lawyers by whom they were approached, solicitation would plainly frustrate rather than serve the overriding public interest in facilitating the free and informed selection of counsel.[4]

The dangers of deception and undue influence posed by solicitation would be far less susceptible to effective State regulation than are the problems presented by public adver-

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that direct solicitation might encourage competition among lawyers and that if the practice were allowed, the women solicited by appellant might subsequently have been approached by a lawyer willing to handle their cases for one-quarter rather than one-third of their recovery. However, one-on-one contacts of this kind would seem far more likely to discourage competition since in many instances the unsophisticated consumer would have no basis for determining the reasonableness of the offer being made and could be persuaded to accept the offer without first examining advertised fees or consulting knowledgeable persons to ascertain its reasonableness. Indeed, in this case, a second lawyer's offer to handle the clients' cases for less than appellant would probably have come too late. In instances such as this, where the client could be represented on a contingent fee basis, the danger would be particularly acute that the first lawyer to approach the client would be able to persuade the client to retain him, since, without misrepresentation, it could be made to appear that the lawyer's services would cost the client nothing.

'Solicitation would pose a special danger of thwarting the free and informed selection of counsel in those instances where the soliciting lawyer could put pressure on prospective clients by reason of other relationships with those individuals.

tising which similarly result from lack of sophistication about legal services. In *Bates*, the Court suggested, that with respect to public advertising such problems could be controlled by the States, in part, through regulations limiting its contents. The Court explained that "[t]he only services that lend themselves to advertising are the routine ones . . .", and even with respect to advertisements concerning such services, the Court refused to "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required. . . ." 97 S.Ct. at 2703, 2709. Similarly, the Court observed that claims of quality "are not susceptible to measurement or verification" and "may be so likely to be misleading as to warrant restriction." 97 S.Ct. at 2709.

To some extent, the States can thus channel *public* advertising of legal services into forms most likely to result in "informed and rational decisionmaking" and least susceptible to consumer confusion and misapprehension, if not outright deception. Since such advertising leaves a record of the communication and is highly visible, attorneys themselves are likely to limit the contents of their advertising to accurate and informative announcements of the kinds permitted.

By contrast, solicitation, being private and spontaneous, is not susceptible to regulation of the type suggested for public advertising in *Bates*. Communications which mislead, confuse, deceive, coerce, or overreach would not come to the attention of State regulatory authorities unless the individual solicited registered a complaint. In many instances, the clients themselves would be unaware that they had been the victims of such practices and could not be expected to alert State authorities. Nor, unlike public advertising, would the communications be subject to continual scrutiny by State authorities and consumer protection organizations. It would

be indeed anomalous for the States to enforce particularized regulations covering public advertising, as suggested in *Bates*, by limiting such advertising to routine services, by requiring publication of necessary disclaimers, and by restricting claims as to quality, while at the same time permitting direct solicitation, for which a comparable regulatory scheme would be utterly impractical.

B. Contacts Initiated By Lawyers Or Their Agents With Potential Consumers Of Legal Services Would Interfere With The Privacy Of The Persons Solicited.

Unlike commercial advertising through public channels of communication, unsolicited and direct contacts by lawyers or their agents with potential clients would necessarily be obtrusive and would in many instances interfere with the privacy of the persons solicited. The Court's decision in *Bates* along with recent developments in the States removing restrictions on certain forms of public communications by lawyers afford the public increasing opportunity to learn about the availability of legal services without subjecting individuals to the harassment and intrusion resulting from direct, personal, and unsolicited contacts.

The Court has previously recognized that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 736 (1970). Accordingly, greater protection under the First Amendment has traditionally been afforded those communications which leave the intended recipients free to ignore the communications if they choose. As the Court observed in *Rowan*, "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit", nor does anyone have the

"right to press even 'good' ideas on an unwilling recipient." 397 U.S. at 737–38. *See also Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974); *Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932). *Cf.*, *Breard* v. *Alexandria*, 341 U.S. 622 (1951), where the Court upheld against challenges based on the First and Fourteenth Amendments a city ordinance prohibiting direct home solicitation for the sale of goods without the prior consent of the occupant.

Direct, personal and unsolicited communications with consumers would not provide them "choice or volition" to receive the communications. *See Lehman, supra*; *Packer Corporation, supra*. In many cases, consumers who would be most in need of legal services would be those who would consider unsolicited contacts by lawyers or their agents the greatest intrusion on their privacy. For example, a decedent's family or the victim of a publicized accident may well prefer to seek counsel through personal contacts, the recommendation of friends, lawyer referral services, newspaper advertisements, or directories than to be subjected to a barrage of direct and unsolicited communications. Similarly, the family of a person who has been arrested may find unsolicited contacts by lawyers to be annoying and embarrassing and may be better able to find counsel for a relative being held through the sources mentioned above or through legal assistance organizations.

Moreover, there are numerous instances in which individuals who are aware that they have claims that could be asserted choose not to do so. The assertion of claims, through litigation or otherwise, ordinarily imposes substantial financial and emotional burdens on the person asserting the claim and may expose him to unwanted public attention and embarrassment. Efforts to persuade reluctant litigants to assert

potential claims could deny such individuals the anonymity to which they should be entitled.

Given the advantage that the first lawyer to contact a prospective client would have, it is reasonable to assume that lawyers engaging in commercial solicitation would have every incentive to seek out potential clients as soon after their claims or needs arose as possible. The resulting "race" to the client might well prompt solicitation at the very times when it would be most offensive.

Finally, even those unsolicited contacts which by themselves were inoffensive and unobjectionable might *cumulatively* encroach upon the individual's right to be let alone. If one lawyer had a constitutionally protected right to solicit, all lawyers would have the same right. In instances where persons potentially in need of legal services could be readily identified, removal of restrictions on solicitation would likely result in a great many calls and visits by soliciting attorneys or their agents. For example, some law offices might instruct clerical personnel to telephone the next of kin of persons listed in newspaper obituaries for purposes of soliciting representation of the estate.

Unlike door-to-door salesmen of ordinary consumer products, soliciting attorneys would interject themselves into some of the most private and personal concerns that individuals have. Protecting persons from harassment by those seeking to encourage them to retain particular lawyers and to take particular actions is a legitimate interest served by rules limiting direct and unsolicited communications with potential consumers of legal services.

C. Solicitation May Adversely Affect The Nature And Quality Of Services Which Are Thereafter Rendered, By Compromising The Attorney's Independent Judgment.

When an attorney's representation follows from his having given unrequested advice to a layman, the lawyer's independent judgment may well be affected by his having persuaded the client to purchase his services. For example, a lawyer who personally appealed to victims of an alleged violation of law to represent them in an action against the alleged wrongdoer would almost certainly be hesitant later to advise his clients that their claims were not meritorious, even if his knowledge of the facts as developed in litigation so indicated. Similarly, a lawyer who solicited a client by means of preliminary and uninformed representations as to the scope of the project to be undertaken might be reluctant to perform all necessary services even if more extensive work was warranted, for fear of being accused of employing bait and switch tactics. This general concern was recognized in *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961), where the Court noted that forms of solicitation may be "inconsistent with the personally disinterested position a lawyer should maintain."

As a part of his obligation to maintain a personally disinterested position, it has always been understood that a lawyer should not encourage individuals to take particular actions primarily for the private benefit of the attorney. To the extent that limitations on commercial solicitation prevent lawyers from "stirring up" litigation, they serve the same ends as prohibitions against barratry. The social policies underlying the traditional proscription of barratry must obviously be reconciled with the need to increase the public's awareness of legal rights and remedies. *Cf.*, *Bates*, 97

S.Ct. at 2705. While a lawsuit is certainly not "an evil in itself" (*Bates*, 97 S.Ct. at 2705, n.32), it is nevertheless clear that no social purpose is served when lawyers interject themselves into controversies, incite the parties, and thereby bring to litigation disputes which would otherwise have been resolved by the parties alone. The States are certainly entitled to consider these problems in formulating regulations controlling unsolicited contacts by lawyers or their intermediaries with potential clients.

III. The Decision Below Should Be Affirmed Since Appellant Was Found To Have Violated Rules Which Are Supported By Legitimate State Interests And Which Are Necessary For Protection Of Those Interests.

Appellant argues, in substance, that although a need exists for some State regulation of commercial solicitation, the Ohio rule at issue is overly broad. Appellant also attempts to argue that his conduct was wholly unobjectionable. In the first place, the record plainly demonstrates that appellant's conduct poses precisely the dangers which support the Ohio rule against solicitation. More importantly, even if in some conceivable situations the rules challenged by appellant could be deemed overbroad, appellant should not be permitted to avail himself of the "overbreadth" doctrine to secure reversal of the decision.

A. Since Ohio's Prohibition Against Commercial Solicitation Is A Reasonable Means Of Preventing Conduct Likely In Most Instances To Endanger State Interests, The Prohibition Should Be Sustained Even Though It May Inhibit Some Unobjectionable Conduct.

Effective regulation of commercial practices frequently requires prophylactic rules that operate before the fact to

prevent conduct that poses the danger of abuse in a high number of instances. Such regulatory schemes should not be vulnerable to First Amendment challenge merely because they can conceivably bar some unobjectionable forms of conduct.

Even in the context of political or ideological speech, the Court has previously sustained broad prophylactic rules that generally support important State interests, even though they serve to prohibit some harmless practices as well. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), for example, the Court upheld statutory limitations on political contributions on the theory that they were necessary "to limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26. Appellants in that case argued that not every large contribution would result in these abuses, and they pointed out that "proven and suspected quid pro quo arrangements" could be dealt with by the "less restrictive means" of bribery laws and narrowly drawn disclosure requirements. 424 U.S. at 27. The Court, however, observed that these remedies would be effective to control "only the most blatant and specific attempts of those with money to influence governmental action" and accordingly held that the legislature could properly determine that broader preventive measures were warranted. 424 U.S. at 28.

Similarly, in *Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548 (1973), the Court sustained the constitutionality of the Hatch Act, 5 U.S.C. §7324(a)(2), which bars federal employees from taking "an active part in political management or in political campaigns" on the theory that employment and advancement in government service should not depend upon political performance. The Court noted that "[i]t may be urged that prohibitions against coercion are sufficient protection." 413 U.S. at 566. However, it recognized that the

First Amendment did not require that the problem of coercion be treated after the fact through narrowly drawn regulations. The Court held that the decision to adopt instead a broad prophylactic rule was properly made by the Congress and the Executive. 413 U.S. at 566.

Where regulations pertain to commercial practices rather than ideological speech, it is even more important that the States be permitted to adopt preventive measures that are necessary for protection of the public. While it may be desirable for forms of ideological speech of questionable legality to go unpunished and undeterred so as to avoid inhibiting legitimate expression, the public's interest in tolerating marginally dangerous conduct differs radically where commercial practices are at issue.

Regulations adopted by the Securities and Exchange Commission provide only one example of a regulatory scheme that imposes broad limitations on practices that in certain instances may threaten important governmental interests. A person who sold unregistered securities in violation of the Securities Act of 1933, 15 U.S.C. §77e, could properly be punished, even if he engaged in no deception, misrepresentation, or other specific abuse.

State regulations prohibiting commercial solicitation are thus not unique in barring a type of conduct, that, although in some instances likely to be harmless, would also in many cases result in abuses that the State may legitimately seek to prevent from occurring. Appellant repeatedly suggests that through narrower regulations directed at specific abuses the State of Ohio could have controlled the most harmful practices associated with solicitation while at the same time permitting his own allegedly unobjectionable conduct.[5] Appellant's argument, however, ignores the State's legitimate interest in having regulations which are effective and objective, which are self-enforcing, and which are practicable to police.

These criteria of practicability would plainly not be satisfied by a regulatory system which sought to evaluate instances of direct solicitation on a case by case basis, in order to determine after the fact whether there had been deception, undue influence, or related abuses mentioned by appellant. As noted above, most forms of solicitation would be largely shielded from public scrutiny, and wrongdoing would come to the attention of State authorities only as a result of client complaints. Apart from the reluctance of clients to become entangled in disagreements with their lawyers, the approach necessitated by narrower rules would also be inadequate because large numbers of consumers would never realize that they had been the victims of improper inducements. Unlike public advertising, solicitation could not be subject to continual and independent scrutiny by State authorities, consumer groups, and other members of the general public.

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[5]In support of his attack on Ohio's "blanket" prohibition against solicitation, appellant argues that narrower regulations would be adequate and refers to a set of proposed changes to the ABA Code, denominated as "Proposal B," which the ABA has distributed for public consideration. Appellant asserts that he would not have been charged with wrongdoing if Proposal B had been adopted in Ohio. While provisions similar to those of Proposal B have not been adopted or interpreted by any State, appellant's actions would seem to be contrary to DR2-103(A) of Proposal B. Moreover, contrary to the implication made in appellant's Brief, the only ethical rules recommended by the ABA for adoption by courts and governmental agencies are those contained in the current ABA Code. The ABA House of Delegates in August, 1977 decided to approve the alternative amendments to Canon 2 now incorporated into the ABA Code rather than Proposal B.

In those instances in which State authorities learned of possible abuses in the solicitation of clients, proof of wrongdoing would be extremely difficult. Conversations would rarely be recorded,* and proof of deception or undue influence would depend entirely upon the recollection of the clients solicited. Subtle nuances in statements made by the persons engaged in the solicitation would frequently be of great importance, and the testimony of unsophisticated witnesses regarding such nuances would rarely be sufficient to warrant disciplinary action, except in the most outrageous cases.

Moreover, it would be impossible through narrower regulations for the States to protect the privacy of a citizen against the intrusion caused by a large number of unsolicited contacts, even though one of those alone would not necessarily be offensive or objectionable.

The First Amendment does not require that the States follow the subjective, after the fact approach urged by appellant. As a legislative matter, the States should be permitted to determine whether commercial solicitation would present problems in a sufficient number of instances to warrant the imposition of preventive measures. *See, Buckley, supra; Letter Carriers, supra; Breard, supra; Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947).

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*Appellant recorded one of his conversations with one of the two women whom he solicited, apparently in an effort to evidence his contract of retainer. However, it could not be expected that those who anticipated that their practices would be called into question would routinely record such conversations. Furthermore, to record a conversation with a potential client without advising the client of the recording, as appellant did, would invade the client's privacy and, at least in Ohio, raise a question of a possible violation of the criminal law. *See* Ohio Rev. Code Ann. §2933.58.

B. Even If The Rules At Issue Were Deemed Broader Than Necessary To Attain Their Objectives, Appellant Should Not Be Permitted To Challenge These Rules Under The First Amendment Since Appellant's Own Conduct Could Properly Have Been Prohibited.

Even assuming *arguendo* that the rules which appellant was found to have violated were broader than necessary to protect State interests, appellant should not be permitted to invoke the overbreadth doctrine to challenge these rules.

The overbreadth approach has been employed at times in the First Amendment context to permit attacks on overly broad statutes without requiring the person making the attack to demonstrate that his specific conduct was protected. The reason for the rule is to avoid chilling constitutionally protected speech. However, in *Bates*, the Court held that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context" and accordingly declined "to apply it to professional advertising, a context where it is not necessary to further its intended objective." 97 S.Ct. at 2708. The Court explained that "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." 97 S.Ct. at 2707. Since solicitation is a practice similarly "linked to commercial well-being," and, at the same time, is a practice certainly no more deserving of First Amendment protection than commercial advertising, it follows from *Bates* that overbreadth should not be applied to State limitations on solicitation.

Appellant has failed to demonstrate that the specific practices for which he was disciplined were deserving of First Amendment protection. Even a cursory review of the facts of

this case reveals conduct plainly illustrating certain of the social concerns which underlie State prohibitions against most forms of solicitation.

Appellant's unsolicited contacts with the two accident victims occurred under circumstances likely to result in confusion and misunderstanding or to breed undue influence. One young woman was approached in her hospital room, while the other was contacted at her mother's home only hours after being released from the hospital. An approach under these circumstances bespeaks undue influence. The accident victim thus contacted would rarely be fully resistant to proposals made by direct solicitation and would be strongly disinclined to compare the services offered by the soliciting lawyer with other available alternatives.

Since appellant's conversation with Carol McClintock was not recorded, it is impossible to ascertain with certainty the representations that he made to her in her hospital room to persuade her to retain him. However, the conversation with Wanda Lou Holbert was recorded, and review of the transcript of that recording reveals that the client was unsophisticated about legal services, that she was very quickly and easily persuaded to consent to representation by appellant, and that her consent was, in all likelihood, given without any understanding of the available alternatives. The transcript further indicates that after securing her consent appellant employed a variety of inducements to encourage his potential client to fulfill the agreement made at the outset of their conversation.

Such practices plainly frustrate the free and informed selection of counsel by persons in need of legal services. The facts of this case clearly illustrate ways in which the first lawyer to approach unsophisticated persons can obtain their uninformed consent to represent them.

Appellant's contacts with these women also represented an intrusion into their privacy. If, as appellant urges here, restrictions on such solicitation were removed, appellant would undoubtedly have been only one of numerous attorneys who would have hurried to the bedside of each victim. Wholly apart from the other interests served by limitations on solicitation, the preservation of the privacy of accident victims would alone be sufficient justification for prohibiting unsolicited contacts of this sort.

CONCLUSION

The present case should not be decided without regard for the probable effects of *Bates*. Forms of public advertising such as newspaper announcements, consumer directories and other communications are likely to become increasingly common sources of consumer information. Although appellant seeks to extend the rationale of *Bates* to his situation, solicitation by lawyers is wholly different from public advertising. Indeed, to permit solicitation is to subvert the very values served by objective informative advertising.

Unlike proper advertising, solicitation is essentially conduct, the purpose of which is to persuade a consumer of legal services to hire a particular lawyer and not to engage in a critical comparison of advertised information from a number of lawyers. Viewed in this light, to permit solicitation is to undercut rather than follow *Bates*. The dangers of in-person selling have been long recognized by consumerists and others, and those dangers are particularly acute in the case of legal services. Moreover, solicitation by lawyers may also compromise the independent judgment of the soliciting lawyer and constitute a substantial invasion of privacy of potential clients.

The ABA respectfully suggests that sound public policy supports the decision made by Ohio to prohibit solicitation such as that engaged in by appellant. In any event, the States should be given sufficient latitude under the First Amendment to regulate such commercial practices. Under these circumstances, the judgment of the Supreme Court of Ohio should be affirmed.

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Respectfully submitted,

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